BOARD OF PROFESSIONAL RESPONSIBILITY
OF THE
SUPREME COURT OF TENNESSEE

FORMAL ETHICS OPINION 2000-F-145

Inquiry is made regarding the ethical propriety of defense attorneys retained by insurance companies to represent the insurance company's insureds, taking the following actions in tort cases, solely because the insurance company directs them to do so: appeal adverse General Sessions judgments against the insureds, and refuse to waive a jury trial in such cases, and refuse to participate in mediation on behalf of the insureds.

In the instant inquiry, the facts as presented reveal that an insurance company requires the attorneys it retains to represent its insureds, to appeal all adverse General Sessions judgments, to demand a jury, and to refuse to participate in mediation. The insurance company requires the attorneys representing their insureds to do so, even if the attorney following the insurance company's demands, believes that the alternative to any or all of aforementioned may be the best means by which to represent its client, the insured. For the purposes of this Opinion, it is assumed that the attorney being asked to follow the aforementioned directives believes that using one or more of the strategies forbidden by the insurance company's directives may be in the best interest of the insured.

Three prior Tennessee Formal Ethics Opinions address the propriety of an insurance company directing an attorney how to represent his or her client, the insured. The most recent, Formal Ethics Opinion 99-F-143, follows the reasoning of Formal Ethics Opinion 85-F-100 as follows:

> This opinion examines the 'ethical obligations of an attorney employed by an insurer to defend the insured when a question arises under the insurance contract as to the continuing obligation of the insurer to defend on behalf of the insured.' ABA Informal Opinions 728 (1963), 832 (1965), and 783 (1965). This Tennessee Formal Opinion holds that the insured, not the insurer, is the attorney's client. Opinion 85-F-100 acknowledges that an attorney so retained is in a 'precarious position of having a potential, if not actual, conflict of interest.' The Opinion requires 'full and complete disclosure of the possible effect of his representation on the exercise of his independent professional judgment and client/insured should be given an opportunity to evaluate the need for representation free of any potential conflict ...'

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Formal Ethics Opinion 88-F-113 directly addresses the propriety of an attorney accepting employment by an insurer on behalf of an insured with conditions limiting or directing the scope of an attorney's representation of his or her client, the insured. Although Formal Ethics Opinion 88-F-113 addresses the propriety of an insurance company controlling the scope and conditions of pre-trial discovery, its reasoning applies equally to the scope and conditions of trial strategy, which include the decision of whether or not to appeal a judgment, the decision of whether or not to demand a jury, and the decision whether or not to participate in mediation.

Formal Ethics Opinion 88-F-113 provides in relevant part as follows:

> DR -5-107(B). A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.
>
> In addition, Disciplinary Rules 5-105(A)(B) of the Code prohibit employment by a lawyer in instances wherein the exercise of his independent professional judgment in behalf of a client, will be adversely affected or if it is likely to involve the lawyer in representing different interests. 'Differing interests' is defined by the Code as:
>
> > Every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client whether it be a conflicting, inconsistent, diverse, or other interest. ...
>
> An attorney may not accept employment by an insurer on behalf of an insured with conditions limiting or directing the scope in extent of his representation of the insured in <u>any manner</u>, including pre-trial discovery. (Emphasis added.)

The Tennessee Supreme Court also addressed this issue in <u>In Re: Petition of Youngblood</u>, 895 S.W.2nd 322 (Tenn. 1995). In reviewing the Board of Professional Responsibility's ethics opinion which addressed the ethical propriety of in-house attorneys of liability insurance companies representing insureds, the Supreme Court noted in its opinion that:

> The employment of an attorney by an insurer to represent insured does not create the relationship of attorney-client between the insurer and the attorney, nor does that employment necessarily impose upon the attorney any duty or loyalty to the insurer which impairs the

> attorney-client relationship between the attorney and the insured or impedes the performance of legal services for the insured by the attorney.
>
> The employer cannot control the details of the attorney's performance, dictate the strategy or tactics employed, or limit the attorney's professional discretion with regard to the representation. Any policy, arrangement or device which effectively limits, by design or operation, the attorney's professional judgment or loyalty to the client is prohibited by the Code, and, undoubtedly, would not be consistent with public policy.

Id. at 328.

Pursuant to the facts as presented, and the authority cited above, an attorney may not accept employment by an insurer on behalf of an insured with conditions limiting or directing the scope and extent of his or her representation of the insured in any manner, including the decision whether or not to appeal a judgment against the insured, whether or not to demand a jury, or whether or not to participate in mediation on the insurer's behalf, unless the client-insured has expressly agreed with any or all of the conditions limiting the nature or scope of the representation, and such agreement is confirmed in writing by the client-insured to the attorney.

Counsel receiving a retention purporting to require undeviating compliance should inform the insurer that such compliance cannot be assured, but that counsel will comply to the extent permitted by counsel's duties to the insured.

It is not proper to call upon the insured to make a decision about the directives in question (To always appeal adverse general sessions verdicts, to never agree to mediation and to never waive the right to a jury) at the outset of the representation, at a time when it is unclear that any of these situations are likely to occur and at a time when the insured cannot readily assess what interests she might have that could be affected by those decisions. Rather, the insured should b informed at the outset that the insurer ordinarily issues such directions. Counsel may further explain that, in light of the insurance policy and the insured's tender of defense, counsel assumes that such directions should be followed unless counsel identifies some reasonable probability that following the directive might differ from an interest of the insured (such as by exposing her to or increasing her exposure to liability in excess of limits). But if counsel identifies a reasonable possibility of an interest being advanced that differs from that of the insured, counsel will consult with the insured about the decision at the time it is to be made and in light of all the circumstances then prevailing.

If this explanation is acceptable to the insured, counsel may proceed with the representation unless and until it appears that one of the directives will (or is likely to) become operative and that compliance presents a reasonable possibility of advancing an interest that differs from that of the insured.

When and if a reasonable probability becomes apparent of an interest being advanced by one of the directives that differs from that of the insured, counsel should first point this out to the insurer and inquire whether it will vary its procedure to avoid that probability. If the insurer will do so, the problem is solved and the insured protected.

If the insurer will not vary its directive, counsel must then consult with the insured. Counsel should describe the decision and its risks and benefits from the standpoint of the insured. Of course, these will include whatever risks to the insured that counsel believes might result from the compliance. But objection to the insurer's directive would also have risks and therefore, where appropriate, counsel should point out that the insurer might take the position that any unjustified refusal to permit counsel to follow its directions would breach the insurance contract. If the insurer were correct in so contending an objection would endanger the insured's coverage. On the other hand, if the insured permits counsel to follow the insurer's directive, the insured could also reserve the right to hold the insurer responsible for any resulting damage to the insured.. (The insurer would be liable if the directive were found to breach its duties under the insurance policy.) The insured should be advised of the utility of obtaining independent counsel, at the insured's own expense, in considering whether to acquiesce in the insurer's directive (perhaps under protest). If the insured acquiesces, after being properly advised, counsel may comply with the insurer's directive.

If the insured objects to the insurer's directive, counsel must advise the insurer that counsel cannot comply. The insurer then has a choice of accepting the insured's position, by withdrawing the objected-to-directive (perhaps reserving its own right to assert that the insured has breached the policy); seeking to persuade the insured to withdraw the objection; or discharging counsel.

In no event may counsel permit the insurer's directive to cause counsel to take action–without the insured informed consent–if counsel believes that action has a reasonable possibility of advancing an interest that would differ from that of the insured.

This 8th day of September, 2000.

BOARD OF PROFESSIONAL
RESPONSIBILITY,

En Banc

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